(10)

No. 92-466

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

LIGGETT GROUP INC.,
now named Brooke Group Ltd.,
Petitioner,
v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

BRIEF OF ATLANTIC RICHFIELD COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

OTIS PRATT PEARSALL
PHILIP H. CURTIS
ARNOLD & PORTER
399 Park Avenue
New York, New York 10022

FRANCIS X. MCCORMACK
DONALD A. BRIGHT
EDWARD E. CLARK
RICHARD C. MORSE
THOMAS H. REILLY
PAUL J. RICHMOND
Atlantic Richfield Company
515 South Flower Street
Los Angeles, California 90071

RONALD C. REDCAY
(Counsel of Record)
MATTHEW T. HEARTNEY
JAMES F. SPEYER
ARNOLD & PORTER
777 South Figueroa Street
Los Angeles, California 90017
(213) 243-4000

*Attorneys for Amicus Curiae
Atlantic Richfield Company*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

28 pp

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-466

LIGGETT GROUP INC.,
now named Brooke Group Ltd.,
Petitioner,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

BRIEF OF ATLANTIC RICHFIELD COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Atlantic Richfield Company ("ARCO"), as *amicus curiae*, respectfully urges that the Court affirm the decision below, *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335 (4th Cir.), *cert. granted*, 113 S. Ct. 490 (1992).[1]

INTEREST OF THE AMICUS CURIAE

ARCO is an integrated oil company that, among other things, refines and markets gasoline throughout the Western United States. ARCO markets gasoline directly through its own gasoline stations and indirectly through independent ARCO-branded distributors and dealers.

[1] Pursuant to Rule 37.3 of this Court, letters showing that counsel for both parties have consented to the filing of this brief are being filed with the Clerk herewith.

In 1982, ARCO instituted a cost-cutting campaign that enabled it to become more competitive through lower gasoline prices to the consumer. The campaign was successful in the market. ARCO and its dealers sold more gasoline. Consumers paid less at the pump. Only ARCO's competitors complained.

One of those competitors, USA Petroleum Company ("USA Petroleum"), filed an antitrust action challenging ARCO's low prices under a number of federal and state statutes. Almost ten years later, that lawsuit is still pending even after this Court held that USA Petroleum on summary judgment had "failed to demonstrate that it has suffered any antitrust injury." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 346 (1990). Incredibly, on remand from this Court, the Ninth Circuit Court of Appeals sent the case back to the district court to permit USA Petroleum to pursue its antitrust claims against ARCO. *USA Petroleum Co. v. Atlantic Richfield Co.*, 972 F.2d 1070 (9th Cir. 1992).

ARCO's predicament underscores the need for a clear and easily applied standard to screen out baseless antitrust challenges by a competitor plaintiff to a firm's price-cutting practices. This is just such a case and provides the Court with an opportunity to announce such a standard. ARCO, both as a competitor and a litigant, has a vital interest in the issues presented here.

ARCO's Low-Price Marketing Program

ARCO began its low-price marketing program in order to compete more effectively. ARCO discontinued its costly credit card program and otherwise lowered its costs of refining and selling gasoline. These measures enabled ARCO to lower the wholesale prices it charged to dealers. ARCO encouraged the dealers to pass these decreases along to consumers in the form of lower pump prices.

By becoming a low-price marketer, ARCO sought to appeal to gasoline consumers who had become more price-conscious after the dramatic price increases of the 1970's. Prior to ARCO's move, price-conscious consumers were mostly attracted to independent marketers such as USA Petroleum, which had traditionally sold gasoline with fewer services and no credit, but at prices lower than those charged by major-brand retail outlets.

ARCO's program was highly successful. ARCO's share of the relevant market (California and Washington) increased from 10-12% in 1981 to roughly 14-16% in 1982. ARCO's low prices were a boon to consumers since the benefit conferred by the low prices was never offset by future monopoly prices.

USA Petroleum's Lawsuit

As a direct result of ARCO's program, USA Petroleum filed suit, claiming that it had lost sales and profits due to ARCO's low prices. USA Petroleum's complaint alleged, among other claims, predatory pricing in violation of § 2 of the Sherman Act, a price-cutting conspiracy between ARCO and its dealers in violation of § 1 of the Sherman Act, and primary-line price discrimination in violation of the Robinson-Patman Act. After years of discovery and other proceedings, costing ARCO millions of dollars, ARCO moved for summary judgment on USA Petroleum's Sherman Act § 2 predatory pricing claim based upon an undisputed record showing that ARCO's market share was far too small to pose any threat of monopolization. In response, USA Petroleum voluntarily dismissed the Sherman Act § 2 claim, conceding that it could not prove predatory pricing. ARCO then moved for summary judgment on USA's Sherman Act § 1 claim on the ground that USA Petroleum, as a competitor of ARCO, had not suffered antitrust injury from the alleged conspiracy to fix low, but now concededly non-predatory, prices.

The district court granted ARCO summary judgment. But, the Ninth Circuit reversed. *USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 689 (9th Cir. 1989). This Court then reversed the Ninth Circuit, holding that USA Petroleum "has failed to meet the antitrust injury test in this case." 495 U.S. at 335. This Court agreed with ARCO that USA Petroleum could not complain of losses from increased competition.

On remand, the Ninth Circuit effectively reversed this Court and refused to issue an order affirming the district court's grant of summary judgment. The same two judges who had originally reversed the district court ruled on remand that USA Petroleum still was entitled to try to establish antitrust injury by proving predatory pricing, which they suggested could be proven solely by showing "pricing below cost," without any need to prove market power or the likelihood of recoupment. 972 F.2d at 1075-76. In so ruling, these judges ignored this Court's holding unequivocally disposing of USA's Sherman Act § 1 claim on antitrust injury grounds, and further ignored this Court's holding that antitrust injury flowing from a competitor's low prices can be established only by proving predatory pricing "under § 2 of the Sherman Act." 495 U.S. at 339. The third judge dissented, stating that his "oath of office require[d] [him] to follow the mandate of the Supreme Court." 972 F.2d at 1077.

ARCO filed a petition for rehearing and suggestion for rehearing *en banc*. This petition is still pending almost six months later. If the Ninth Circuit does not grant rehearing, ARCO will be compelled to return to this Court for a writ directing the Ninth Circuit to follow this Court's mandate.

The Impact On ARCO Of This Court's Decision In This Case

ARCO has a vital interest in the antitrust issues presented in this case. Petitioner cited the Ninth Circuit's

decision on remand in *ARCO* as one of the circuit court opinions in conflict with the Fourth Circuit's decision in this case. Petition For Writ Of Certiorari ("Petition") 20-21 & n.27. This Court's affirmance of the Fourth Circuit will send a clear signal to the Ninth Circuit that its decision on remand in the *ARCO* case not only disregards this Court's mandate, but is completely out of step with this Court's other recent decisions on price cutting. Such a signal should bring about the end of USA Petroleum's antitrust case without further ado.

More importantly, the termination of USA Petroleum's lawsuit, however belatedly, and the announcement in this case of a rule precluding antitrust claims based upon price cutting where predation is impossible, will dispel the chilling effect such claims have on price cutting. Not only respondent and ARCO, but also consumers, who enjoy the benefits of low prices, and the courts, which will not be burdened with baseless claims, will be the beneficiaries of such a ruling.

SUMMARY OF ARGUMENT

In a line of cases from *Brunswick* [2] to *ARCO*,[3] which includes *Cargill* [4] and *Matsushita*,[5] this Court has rejected every attempt by a competitor plaintiff to impose antitrust liability based upon price cutting that did not threaten to create a monopoly. This is just such a case. Nonetheless, petitioner proceeds as though these opinions do not control its Robinson-Patman Act claim. Petitioner

[2] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ("*Brunswick*").

[3] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) ("*ARCO*").

[4] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) ("*Cargill*").

[5] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*").

suggests that such claims are uniquely exempt from limitations applicable to all of the other antitrust laws when the challenged conduct is price cutting. However, neither the language of, nor the policy underlying, the Robinson-Patman Act supports petitioner's position. Rather, *Matsushita*, *Cargill* and *ARCO* support affirmance of the Fourth Circuit's ruling rejecting petitioner's primary-line Robinson-Patman Act claim based on predatory pricing where respondent's 12% market share does not present any danger of monopoly.

Petitioner argues that applying a dangerous probability of monopoly standard to its claim would impermissibly coalesce the Robinson-Patman Act and the Sherman Act. Petitioner further argues that the language of the Robinson-Patman Act and existing case law preclude such a coalescence. But, petitioner's argument ignores the Court's holdings (in *ARCO* and *Cargill*, respectively) that competitor plaintiffs suing under Sherman Act § 1 and Clayton Act § 7 also must establish predatory pricing under Sherman Act § 2. Moreover, both the language of the Robinson-Patman Act and the cases interpreting it confirm that the Act should be construed, like the other antitrust laws, to avoid burdening competition that benefits consumers. The Act expressly refers to pricing conduct that injures *competition*, not *competitors*. Faithful to that language, the circuit courts have applied Sherman Act § 2 liability standards to primary-line Robinson-Patman Act claims.

Antitrust policy supports consistent application across all antitrust laws of the rule requiring rejection of claims by competitors challenging low prices that pose no threat of monopoly. Consumers, whose welfare is the primary concern of the antitrust laws, benefit from such low prices. Courts should protect consumers' interest by guarding against antitrust claims that could chill price-cutting activity. Petitioner's indefinite, difficult-to-apply and over-broad definition of predatory pricing, even if limited

to Robinson-Patman Act claims, will discourage vigorous price competition, encourage suits challenging legitimate price cutting, and make such suits more difficult to dispose of at an early stage of litigation. Accordingly, the Court should apply to such claims the same "dangerous probability" requirement it uses in price-cutting claims under the other antitrust laws.

ARGUMENT

PETITIONER'S ROBINSON-PATMAN ACT CLAIM DOES NOT JUSTIFY A DEPARTURE FROM THIS COURT'S RECENT DECISIONS CONSISTENTLY REJECTING COMPETITOR LAWSUITS ATTACKING LOW PRICES THAT DO NOT THREATEN RECOUPMENT THROUGH FUTURE MONOPOLY

A. The Court Consistently Has Rejected Antitrust Claims By Firms Challenging Their Competitor's Low Prices That Posed No Threat Of Monopoly

In four cases in which the plaintiff was a competitor complaining of the defendant's low prices (actual or threatened), the Court formulated and applied the antitrust-injury requirement in order to screen out claims that, while arguably encompassed within the language of the substantive antitrust laws, were inimical to antitrust policy. *See* notes 2-5 *supra*. "Antitrust injury" performs this screening function by obligating an antitrust plaintiff to prove that he has been injured by "an *anti-competitive* aspect of the defendant's conduct." *ARCO*, 495 U.S. at 340-41 (emphasis in original). The antitrust-injury requirement thus ensures

> "that the harm claimed by plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and *it prevents losses that*

stem from competition from supporting suits by private plaintiffs for either damages or equitable relief."

ARCO, 495 U.S. at 342 (emphasis added).[6]

Of greatest significance here, the Court in *ARCO* held that "in the context of pricing practices, only predatory pricing has the requisite anti-competitive effect [for antitrust injury]." 495 U.S. at 339. Low, but non-predatory, prices cannot give rise to antitrust injury because "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition . . . ." *Id.* at 340.

ARCO did not make new law in this regard. Rather, it simply followed the holding in *Cargill*, 479 U.S. at 116-19, that a plaintiff complaining of competition from a rival's low but non-predatory prices cannot establish antitrust injury. In *Cargill*, the Court found that a competitor plaintiff could not challenge a merger presumed to be illegal under § 7 of the Clayton Act on the ground that it would be forced to compete against the merged company's low prices. Low, but non-predatory, prices could only enhance rather than threaten competition, and therefore could not inflict antitrust injury:

> "To hold that the antitrust laws protect competitors from the loss of profits due to [non-predatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share."

479 U.S. at 116. Even earlier, in *Matsushita*, the Court held that the only conspiracy that could "have caused [plaintiffs that were competitors of defendants] to suffer an 'antitrust injury'" was a "conspiracy to monopolize the American market through predatory pricing. . . ." 475 U.S. at 586.

---

[6] *See* Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 35 (1984) (The antitrust-injury doctrine "responds to the fact that often the lure of damages (or the ability to raise rivals' costs) induces plaintiff to challenge conduct that is procompetitive").

As this language from *Matsushita* suggests, predatory pricing and monopolization (actual or attempted) go hand in hand.[7] Other language in *Matsushita* makes even more clear that predatory pricing occurs only where the low prices can enable a dominant firm to eliminate its rivals and then charge monopoly prices:

> "[T]he conspirators must have a reasonable expectation of recovering, *in the form of later monopoly* profits, more than the losses suffered. . . . Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed entry by new competitors eager to share in the excess profits. The success of *any* predatory scheme depends on *maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.*"

475 U.S. at 589 (emphasis (except for the Court's emphasis on "maintaining") added).

Similarly, the Court in *Cargill* also noted that only a firm with a market share large enough to threaten monopoly could engage in predatory pricing. Indeed, the Court dismissed the possibility that a firm with a 21% market share could engage in predatory pricing. 479 U.S. at 119 n.15. The Court stated that such a firm

> "would harm only itself by embarking on a sustained campaign of predatory pricing. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme."

Id. Quoting *Matsushita*, the Court further noted that successful predatory pricing depends on "maintaining *monopoly* power for long enough both to recoup the preda-

---

[7] *See* Page & Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 Mich. L. Rev. 111, 119 n.48 (1992) ("Although dangerous probability is indeed a § 2 requirement, in a broader sense it is inseparable from any coherent definition of predatory pricing").

tor's losses and to harvest some additional gain." *Cargill*, 479 U.S. at 121 n.17 (emphasis added).

Most recently, the Court in *ARCO* reaffirmed that the predatory pricing that is required for antitrust injury in a suit by a competitor challenging low prices exists only in the context of threatened or actual monopolization. The plaintiff in *ARCO* argued that it would be improper to require it to prove the Sherman Act § 2 element of dangerous probability of monopolization in order to bring its claim for violation of Sherman Act § 1 based upon an alleged price-cutting conspiracy between ARCO and its dealers. The Court expressly rejected plaintiff's argument:

> "Respondent further argues that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade under § 1 of the Sherman Act, rather than an attempt to monopolize prohibited by § 2. Respondent notes that the two sections of the Act are quite different. . . . In sum, *respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under § 2 of the Sherman Act.*
>
> *We reject respondent's argument.*"

495 U.S. at 338-39 (emphasis added).

B. The Predatory Pricing Principles Announced In The Court's Antitrust-Injury Opinions Apply To Petitioner's Primary-Line Robinson-Patman Act Claim

The principle that a firm can establish antitrust injury from its competitor's pricing practices only by proving predatory pricing under § 2 of the Sherman Act applies to all antitrust actions. The Court in *ARCO* explicitly so held. 495 U.S. at 340 ("We have adhered to this principle regardless of the type of antitrust claim involved"). The Court rejected the argument that a doctrine developed (in *Brunswick* and *Cargill*) in the context of a Clayton Act § 7 violation was inapplicable to the Sherman Act § 1 violation alleged in *ARCO*. The *ARCO* Court explained:

> "To be sure, the source of the price competition in the instant case was an agreement allegedly unlawful under § 1 of the Sherman Act rather than a merger in violation of § 7 of the Clayton Act. *But that difference is not salient.*"

495 U.S. at 340 (emphasis added).

This holding disposes of any argument that a difference between the Sherman Act and the Robinson-Patman Act is salient for these purposes. Thus, the relevant language of the Robinson-Patman Act and Clayton Act § 7 is identical. Both prohibit conduct (the former prohibits price discrimination, and the latter prohibits mergers) that "may . . . substantially . . . lessen competition or tend to create a monopoly . . . ." 15 U.S.C. §§ 13(a), 18. Accordingly, the same antitrust-injury principles should apply whether the source of the price competition is a discriminatorily low price in violation of the Robinson-Patman Act or a merger illegal under the Clayton Act. The antitrust-injury test therefore requires the plaintiff in a primary-line price discrimination claim to prove predatory pricing under Sherman Act § 2 standards. Petitioner's inability to satisfy this standard should be fatal to its claim.

Moreover, the Court should apply the same standard to determine the issue presented by the Petition—whether an injury to competition, necessary for a primary-line Robinson-Patman Act violation, has occurred. Applying one injury-to-competition standard to determine if a violation had occurred and a different such standard to determine the standing of the natural private plaintiff in such a case—a competitor of the discriminating seller—would be incongruous. Both parties here advocate avoiding such an incongruity. Petitioner's Reply Brief In Support Of Petition For Writ Of Certiorari (at 5-6 n.10), argues for identical standards for determining a competitor-plaintiff's antitrust injury and the injury-to-competition element.

Of course, petitioner argues that both can be satisfied without proving predatory pricing in violation of Sherman Act § 2. Petitioner argues that the Robinson-Patman Act's prohibition of price discrimination that "may . . . substantially . . . lessen competition or tend to create a monopoly . . . ." (15 U.S.C. § 13(a)) indicates an intent to reach conduct that does not threaten a monopoly. Brief For The Petitioner 24-27. But, petitioner's argument ignores the antitrust-injury opinions discussed above and, as discussed below, is not compelled by either the language of the Robinson-Patman Act or the cases interpreting the Act.

The Act expressly refers to price discrimination that lessens *competition*. It does not prohibit discrimination that injures a *competitor*.[8] The Act is in accord with the fundamental principle that "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *ARCO*, 495 U.S. at 338 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)).[9] The Act therefore provides no reason to depart from this Court's statements that prices that are low, but not predatory under Sherman Act § 2, do not injure competition. *ARCO*, 495 U.S. at 339-40; *see supra* at 8-10.

The relevant case law is in accord. Several circuit courts have held that the standard for imposing primary-

[8] *See* P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 720d (Supp. 1992) (this language "does refer to competition rather than competitors. Thus, some actual or prospective market impact is contemplated. The phrase 'may be' may indicate something less than a threat of imminent monopolization, but it remains hard to see how even below-cost pricing by a small firm in a market without entry barriers could satisfy this statute").

[9] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978) ("the Robinson-Patman Act should be construed so as to insure its coherence with 'the broader antitrust policies that have been laid down by Congress'").

line liability under the Robinson-Patman Act should be the same as that under § 2 of the Sherman Act. *See, e.g.*, *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345 (8th Cir. 1987); *D. E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1439-40 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984). Professor Areeda describes these and other opinions as follows:

> "In a very significant development, several courts have accepted the main text argument that primary-line injury under the Robinson-Patman Act implicates the same kinds of concerns as predatory pricing under Sherman Act § 2."

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 720c (Supp. 1992). Professor Areeda further notes that

> "the key point is that both statutes require the identification of an improper price and the distinction between unjustified and justified pricing. There is really only a single analytical process for doing so. . . . whatever one's definition of pro-competitive or anti-competitive pricing may be, it does not vary with the statutory words."

Id.; *see also* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 727 (1975) (noting that "[t]he basic substantive issues raised by the [Robinson-Patman] Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical").

Petitioner argues that applying Sherman Act standards in a Robinson-Patman Act case would "invite a complete coalescence" of the two statutes. Petition 21-22; Brief For The Petitioner 24. Once again, petitioner ignores the ground already plowed in this Court's antitrust injury opinions. In *Cargill*, the Court applied the Sherman Act concept of predatory pricing even though the substantive antitrust provision involved in that case—Clayton Act § 7—makes illegal mergers that might not be

illegal under the Sherman Act. *See supra* at 8. Nonetheless, as the dissent in *Cargill* noted (479 U.S. at 123 & n.1), the majority's requirement that the competitor plaintiff prove predatory pricing effectively required the competitor-plaintiff in a § 7 case to "establish a violation of the Sherman Act."

In *ARCO*, the Court again required the plaintiff to prove predatory pricing under Sherman Act § 2 where the plaintiff asserted a violation of a different antitrust law—there Sherman Act § 1. The plaintiff in *ARCO* had argued that this would impermissibly engraft a § 2 standard on a § 1 claim. The *ARCO* plaintiff's argument is virtually identical to petitioner's argument that the Fourth Circuit opinion in this case improperly "coalesces" the Sherman Act with the Robinson-Patman Act. The Court rejected plaintiff's argument in *ARCO*, and there are no statutory or case-law reasons not to reject petitioner's argument here. Moreover, as demonstrated below, the same antitrust policies that underlie *Matsushita*, *Cargill* and *ARCO* support rejection of the argument.

C. Antitrust Policy Supports Rejection Of Competitor Lawsuits, Brought Under Any Antitrust Law, Where The Complaint Is Low Prices But The Defendant's Market Share Is Too Small To Present Any Real Danger Of Monopoly Power

1. *Low prices benefit consumers, whose welfare is the primary concern of the antitrust laws*

The consumer interest in competition is the touchstone of antitrust policy. It would be "inimical to the purposes of" the antitrust laws to award damages for losses from increased competition, because "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)).

Low prices are both the means of competition and the fruit of the competitive process. "[C]utting prices in order to increase business often is the very essence of competition." *Matsushita*, 475 U.S. at 594; *see Cargill*, 479 U.S. at 121 n.17 ("lowering prices . . . stimulates competition . . . ."); *ARCO*, 495 U.S. at 340 ("Low prices benefit consumers regardless of how those prices are set . . . ."); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988) (interbrand competition leads to lower prices to consumers and for that reason is "'the primary concern of antitrust law'"). The possibility that these low prices may deprive rivals of profits is of no concern under the antitrust laws. *See ARCO*, 495 U.S. at 337 n.7 ("a firm cannot claim antitrust injury from non-predatory price competition on the asserted ground that it is 'ruinous'. [citations omitted] '[T]he statutory policy precludes inquiry into the question whether competition is good or bad'"); *Spectrum Sports, Inc. v. McQuillan*, 61 U.S.L.W. 4123, 4127 (U.S. Jan. 25, 1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market. . . .").

Low prices can threaten the consumer interest in competition in only one instance: when the firm charging the low prices is in a position to use those prices to eliminate its rivals and then recoup the benefits bestowed by the low prices by charging monopoly prices. *See supra* at 8-10.[10]

---

[10] The Seventh Circuit, in *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990), recognized that without the possibility of future monopoly prices, low prices can only benefit consumers and thus cannot be predatory:

> "Predatory prices are an investment in a future monopoly, a sacrifice of today's profits for tomorrow's. The investment must be recouped. If a monopoly price later is impossible, then the sequence is unprofitable and we may infer that the low price now is not predatory. More importantly, if there can be no 'later' in which recoupment could occur, then the consumer is an unambiguous beneficiary even if the current price is less than the cost of production. Price less than cost today, followed by the competitive price tomorrow, bestows a gift on consumers. Because antitrust laws are designed for

The Fourth Circuit here concluded that where respondent "controlled only 12% of the relevant market" its prices "could not be found to be predatory because they did not provide an economically rational basis 'to recoup . . . losses and harvest some additional gain.'" 964 F.2d at 342. Petitioner attacks that conclusion, but its attack gives insufficient weight to the policies in favor of beneficial price cutting and the potential deterrent effect thereon of the rule its champions.

2. *In order not to deter pro-competitive price cutting, a clear and easily applied rule is needed to determine when future monopoly pricing is threatened*

Rules that create legal risks for price cutters should be avoided. Such rules "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594; *see Sharp, supra*, 485 U.S. at 728 (warning against rules that cause "[m]anufacturers to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties").

A rule lacking clear standards for a firm to forecast when price cutting will be deemed illegal inevitably will create these risks and frustrate the goals of antitrust. A firm that is unsure whether its price cutting will be deemed illegal has a strong incentive not to cut prices at all. The First Circuit in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (quoted in part in *Matsushita*, 475 U.S. at 594), expressed this point succinctly:

> "Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. . . . we must be concerned lest a rule or precedent that

---

the benefit of consumers, not competitors, . . . a gift of this kind is not actionable."

881 F.2d at 1401 (citations omitted).

> authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."

See Baumol & Ordover, *Use of Antitrust To Subvert Competition*, 28 J. L. & Econ. 247, 254 (1985) ("[t]he potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerilla warfare and intimidated into the sort of gentlemanly competitive behavior that is the antithesis of true competition").

An indefinite or unclear rule also will provide a similar lack of guidance to courts. It therefore will significantly decrease the possibility of disposing of an antitrust lawsuit on summary judgment. The prospect of being forced to defend a lawsuit through trial, no matter how meritorious the defense, necessarily will encourage firms to avoid price-cutting activities that could expose them to litigation. *See* Snyder & Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 552, 588 (1991) (advocating bright line tests such as market-share screens to dispose of antitrust claims at the summary judgment stage: "[u]nless courts are able effectively to confine suits by competitor plaintiffs to those that are truly meritorious, and to do so relatively early in the litigation process, such suits may have significant anticompetitive consequences").[11] More-

---

[11] Professor Areeda agrees that market-share tests are appropriate screens for analyzing predatory pricing:

> "[I]t will sometimes be obvious at an early stage of discovery that there is no relevant market in which predation could create a dangerous probability of monopoly and thus in which predation has probably occured. Dismissal of claims is presumptively appropriate whenever it appears that the defendant is not already dominant within a concentrated market or that entry barriers are too low to allow a hypothetical predator who has ruined rivals to maintain monopoly prices

over, the inability of firms to dispose quickly of meritless claims, combined with the consequent real possibility of a large treble-damage award, creates a strong incentive to settle such claims regardless of their lack of merit, further discouraging beneficial price cutting.

An indefinite or unclear price-cutting rule has the added disadvantage of encouraging competitor lawsuits challenging legitimate price cutting. Baumol & Ordover, *supra*, at 265 ("vagueness in the standards of unacceptable behavior plays into the hands of those who would use the antitrust laws as anticompetitive weapons"). Firms that are hurt by competition already have a natural incentive to use the antitrust laws to hinder procompetitive behavior. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 34 (1984) ("[a]ntitrust litigation is attractive as a method of raising rival's costs . . . ."); Baumol & Ordover, *supra*, at 252 ("[a]ntitrust, whose objective is the preservation of competition, by its very nature lends itself to use as a means to undermine effective competition. This . . . is very dangerous for the workings of our economy"). The vague and indefinite rule sought by petitioner would increase this incentive.

ARCO's experience in defending the lawsuit brought against it by USA Petroleum illustrates the need for clear and easily applied screens to filter out baseless challenges to price-cutting conduct. ARCO has spent almost 10 years and millions of dollars defending itself against an antitrust lawsuit that was initiated in re-

---

without causing reentry or new entry that would restore competitive prices."

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 711.2b (Supp. 1992). According to Professor Areeda, most commentators agree that "predatory pricing is a plausible strategy only for a firm that begins with a very substantial market share." *Id.* at ¶ 711.2c. Professor Areeda further notes that "it seems reasonable to presume that a market share below 60 percent is too small to make predation likely." *Id.*

sponse to ARCO's decision to eliminate its credit card and implement other price-reducing measures. ARCO's price cutting benefited consumers, and because ARCO never had more than a 17% market share during any relevant period, those gains to consumers never were, and never could have been, offset by later monopoly prices. Accordingly, ARCO's price cutting was undeniably procompetitive. Nonetheless, ARCO's conduct has caused it, paradoxically, to be entangled in an antitrust lawsuit that has not yet ended. A rule barring competitors from using any of the antitrust laws to challenge a rival's price cutting when that rival poses no threat of monopoly would have ended USA Petroleum's suit early or caused it not to sue in the first place. A rule to the contrary will deter beneficial price cutting in gasoline and other product markets.

3. *Only the "dangerous probability" test provides the necessary clear-cut standard.*

For all of the foregoing reasons, a clear-cut standard for determining when firms may legally engage in price-cutting activity is necessary. The dangerous probability of monopolization requirement satisfies this need by providing a market-based filter to weed out baseless claims of illegal price cutting at an early stage of litigation. The Court has applied this standard to claims involving predatory conduct under Sherman Act § 2. Through the vehicle of antitrust injury, it also has applied this standard to Sherman Act § 1 claims brought by competitors in *ARCO*, and has suggested its application to Clayton Act § 7 claims brought by competitors in *Cargill*. Because price cutting has the same competitive effect regardless of the statute under which it is challenged, the Court should apply the same standard to the price cutting challenged under § 2(a) of the Robinson-Patman Act in this case.

4. *Petitioner's proposed standard will discourage, rather than encourage, legitimate price competition*

The rule proposed by petitioner for primary-line Robinson-Patman Act liability does not provide the necessary clear-cut standard. In fact, as demonstrated below, it offers only uncertainty and ambiguity. If adopted, petitioner's proposed rule will encourage claims that deter beneficial price cutting.

Petitioner proposes the following rule for determining predatory pricing in a primary-line Robinson-Patman Act case:

> "substantial, unjustified, and discriminatory pricing below average variable cost with a reasonable prospect of recoupment."

Brief For The Petitioner 43. Petitioner further states that

> "[a] reasonable prospect of recoupment can be inferred from the likelihood of effective oligopolistic pricing at supra-competitive levels, from a history of such pricing, or from the clear market analysis of a sophisticated and informed defendant."

Id. at n.56. Petitioner, however, proposes no definition of the "oligopolistic pricing" used in its test. In failing to define this term, petitioner proposes a rule lacking the definiteness needed to ensure that pro-competitive conduct is not deterred. *See supra* at 16-18.

It is far from clear that oligopoly can be precisely defined. *See* F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 17 (3d ed. 1990) ("it is difficult to specify exactly where oligopoly shades into a competitive market structure"). Professor Areeda has recognized the difficulty of defining oligopoly:

> "demonstrating that a few firms share monopoly power is highly complex. . . . one could define 'collusive' oligopoly in terms of concentration ratios, such as four firms accounting for seventy-five percent or more of a market. Such concentration measures, however have serious defects. . . ."

Areeda & Turner, *Williamson on Predatory Pricing*, 87 Yale L.J. 1337, 1348 (1978). This difficulty makes petitioner's proposed rule unworkable.[12] It would inject an unwanted element of risk into vigorous price competition by encouraging competitor lawsuits aimed at restraining aggressive pricing. *See* Baumol & Ordover, *supra*, at 254 ("obscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition. As we know, it is not always necessary to win cases in order to blunt a rival's competitive weapons").

But even a workable definition of oligopoly cannot solve the problems that petitioner's proposal presents. According to some economists, almost 50% of all U.S. manufacturing sectors are considered oligopolistic. Scherer & Ross, *supra*, at 82. This enormous segment of American industry would need to think twice about whether or not to engage in vigorous price competition. Any firm in this segment, with no matter how small a market share, that decides to cut its prices would expose itself to the threat of a treble-damages lawsuit by an injured competitor. Moreover, such a firm would risk losing a lawsuit, for economists and academicians can undoubtedly spin out a theory of recoupment to fit almost any situation.[13] In

[12] Not only is it difficult to define oligopoly, it is also difficult to determine whether oligopolists will engage in "cooperative behavior [or] gravitate towards price warfare. . . . Recognizing the wide range of behavior and theoretical predictions, some economists have asserted that the oligopoly problem is indeterminate." Scherer & Ross, *supra*, at 199. Petitioner's rule, which would require juries to predict the "likelihood of effective oligopolistic pricing," is unworkable for this additional reason.

[13] Judge Easterbrook has compellingly stated the case against permitting an overzealous search for anti-competitive conduct in a category of conduct that primarily benefits competition (such as price cutting):

these circumstances, the firm likely would forego the price cut, depriving consumers of the benefit of lower prices.

The potential cost to consumers, moreover, is not outweighed by the purported benefits of petitioner's rule. Predatory pricing by a potential monopolist is exceedingly rare and difficult to execute successfully because the predator has little or no assurance that the losses it incurs can ever be recouped. *Matsushita*, 574 U.S. at 589. Predatory pricing by one firm in an oligopoly (if it exists at all) must be far rarer, and incalculably more difficult to execute successfully, because the predator has much less of an assurance that its losses can be recouped. *See* Areeda & Turner, *Williamson on Predatory Pricing*, *supra*, at 1348 ("uncertain as the profitability of limit-pricing behavior may be for a monopolist, it is even more risky for a firm facing existing rivals accounting for forty percent of the market . . . ."); *cf. Matsushita*, 574 U.S. at 592-93 (noting difficulty of recoupment through explicit agreement among competitors). There is thus little danger that by rejecting petitioner's proposed rule and affirming the Fourth Circuit the Court will permit substantial anticompetitive activity to go unpunished.

> "the world of economic theory is full of 'existence theorems'—proofs that under certain conditions ordinarily-beneficial practices could have undesirable consequences. But we cannot live by existence theorems. The costs of searching for these undesirable examples are high. The costs of deterring beneficial conduct (a by-product of any search for the undesirable examples) are high. *When most examples of a category of conduct are competitive, the rules of litigation should be "stacked" so that they do not ensnare many of these practices just to make sure that the few anticompetitive ones are caught.*"

Easterbrook, *supra*, at 15 (emphasis added); *see also A. A. Poultry, supra*, 881 F. 2d at 1403-04 ("courts should treat with great skepticism complaints by competitors who are injured by the low prices that customers adore. . .").

CONCLUSION

The judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

RONALD C. REDCAY
(Counsel of Record)
MATTHEW T. HEARTNEY
JAMES F. SPEYER
ARNOLD & PORTER
777 South Figueroa Street
Los Angeles, California 90017
(213) 243-4000

OTIS PRATT PEARSALL
PHILIP H. CURTIS
ARNOLD & PORTER
399 Park Avenue
New York, New York 10022

FRANCIS X. MCCORMACK
DONALD A. BRIGHT
EDWARD E. CLARK
RICHARD C. MORSE
THOMAS H. REILLY
PAUL J. RICHMOND
Atlantic Richfield Company
515 South Flower Street
Los Angeles, California 90071

Attorneys for Amicus Curiae Atlantic Richfield Company

February 3, 1993